Supreme Court, U.S.
FILED
MAR 1 1996
CLERK

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NO. 95-1187

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

COUNTY OF BERKS, PENNSYLVANIA, et al.,
Petitioners,

v.

MERRY J. MURTAGH, et al.,
Respondents.

Petition for a Writ of Certiorari
to the Commonwealth Court of Pennsylvania

PLAINTIFFS'/RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Richard D. Adamson
RICHARD D. ADAMSON,
ATTORNEY AT LAW
253 West Main Street
Kutztown, PA 19530
(215) 683-6500

Robert A. Swift
(Counsel of Record)
Denis F. Sheils
KOHN, SWIFT & GRAF, P.C.
2400 One Reading Center
1101 Market Street
Philadelphia, PA 19107
(215) 238-1700

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QUESTIONS PRESENTED

1. Whether the interlocutory judgments of the Supreme Court of Pennsylvania and the Commonwealth Court of Pennsylvania are "final order[s]" within the meaning of 28 U.S.C. § 1257(a).

2. Whether a state's highest court may permit adjudication under the Civil Rights Act, 42 U.S.C. § 1983, of a class action seeking damages only resulting from systematic equal protection violations from a county's "Welcome Stranger" policy of taxation.

PARTIES TO THE PROCEEDING

Petitioners' statement of the parties to the proceedings is correct. Respondents herein have no parent or subsidiary companies to list pursuant to Rule 29.1.

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STATUTES:

United States Code:

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JURISDICTION

For the reasons set forth in Point I, infra, Respondents contend that this Court lacks jurisdiction under 28 U.S.C. § 1257(a) to review the interlocutory orders herein.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Section 1257(a) of Title 28, United States Code, provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. § 1257(a).

Section 1983 of Title 42, United States Code, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the

> Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983.

STATEMENT OF THE CASE

Steadily increasing real estate values in Berks County, Pennsylvania created a gaping disparity among property assessments – and therefore taxes paid – between long-term residents and newcomers. Dubbed a "Welcome Stranger" policy, this practice requires newcomers to pay a disproportionate amount of taxes to support local government. Although mandated by State constitution and statute to use a "current value" system of real property taxation,[1] see Pa. Const. Art. VIII § 1; 72 Pa. C.S. § 5020-101 et seq., governmental entities in Berks County utilized a system of "spot assessment," that is, reassessment for property tax purposes of only those parcels which change ownership for a fair market value.

Seven years ago in Allegheny Pittsburgh Coal Co. v. County Commission, 488 U.S. 336 (1989) this Court declared unconstitutional a West Virginia practice of de facto discrimination

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[1] A "current value" system requires that all property be taxed at a uniform rate according to its current estimated actual market value. By contrast, an "acquisition value" system, such as was approved by the Court in Nordlinger v. Hahn, 505 U.S. 1 (1992), assesses property only when it changes hands at its acquisition value.

engendered by a "Welcome Stranger" policy in a "current value" system of real property taxation. The property tax assessment practices in Berks County resemble the practices in West Virginia with one notable exception: while the West Virginia county had not performed a general reassessment for over ten years, Berks County never conducted a county-wide reassessment in its history. In short, the Petitioners' scheme of taxing real property in Berks County is constitutionally indefensible and the deprivations profound.

Respondents herein are recent residents and taxpayers in Berks County who filed this class action in state court alleging a single cause of action under the federal civil rights law, 42 U.S.C. § 1983, seeking damages for overpayment of taxes. The trial court required Respondents to join as party defendants certain local governments and school districts (hereinafter "the Local Taxing Authorities") and then overruled their demurrers to the Amended Complaint. The trial court then certified for appeal the issue of whether the Local Taxing Authorities could be liable under § 1983 for the wrongful assessment practices of the Board of Assessment Appeals. The Commonwealth Court, Pennsylvania's intermediate appellate court, never reached this issue. Instead, Commonwealth Court ruled that plaintiffs could not bring their § 1983 action in state court because state administrative and judicial remedies are plain, adequate and complete. Greenwich Township v. Murtagh, 144 Pa. Commw. 624, 601 A.2d 1352 (1992).

The Pennsylvania Supreme Court granted certiorari and reversed. The Pennsylvania Supreme Court ruled that:

> where plaintiffs are a class of the taxpayers challenging the constitutionality of the system by which property tax assessments are made, they can maintain their section 1983 suit in common pleas court without first exhausting their statutory remedies.

Murtagh v. County of Berks, 535 Pa. 50, 634 A.2d 179 (1993), cert. denied, 114 S.Ct. 1397 (1994) (hereinafter "Murtagh I"). The court specifically reserved decision on whether state statutory remedies are plain, adequate and complete, and remanded the case to the Commonwealth Court for consideration of the issue certified for appeal. This Court denied a Petition for Writ of Certiorari on April 4, 1994. 114 S.Ct. 1397 (1994).

On remand, in a 4-3 decision the Commonwealth Court held that the Local Taxing Authorities could not be held liable in this § 1983 action since it is the Petitioner County, not the Local Taxing Authorities, with final policymaking authority over the supervision, manner and method of assessment of real property in Berks County.

On June 19, 1995, this Court in an unrelated case, National Private Truck Council, Inc. v. Oklahoma Tax Commission, Inc., 115 S.Ct. 2351 (1995), held that "Congress did not authorize injunctive or declaratory relief under § 1983 in state tax cases when there is an adequate remedy at law." Id., 115 S.Ct. at 2355 (emphasis added). Although the Court at footnote 3 of its opinion stated that it had accepted certiorari to decide a conflict among state courts and cited, inter alia, the decision of the Pennsylvania Supreme Court in Murtagh I, it did not specifically address the issue presented in the Pennsylvania Supreme Court's decision, i.e., whether a state court could adjudicate a § 1983 class action alleging damages only arising from systematic equal protection violations.

Petitioners thereafter filed a petition seeking the Pennsylvania Supreme Court to review both the Commonwealth Court's decision and its decision in Murtagh I in light of National Private Truck Council. The Pennsylvania Supreme Court denied the petition. On January 25, 1996, Petitioners filed the instant Petition for a Writ of Certiorari.

REASONS FOR DENYING THE WRIT

The Petition for Writ of Certiorari should be denied since there is no jurisdictional basis under 28 U.S.C. § 1257(a) for review of the interlocutory orders of a state court. This Court previously denied a petition for writ of certiorari on the jurisdictional issue raised. There is no reason to change that result particularly when the decision of the Pennsylvania Supreme Court furthers state interests in avoiding a multiplicity of lawsuits by way of a class action. Furthermore, the Supreme Court of Pennsylvania reserved decision regarding whether state statutory remedies are plain, adequate and complete, and specifically limited its ruling to class actions challenging systematic practices. The narrow scope of the Pennsylvania Supreme Court's holding thus makes this case inappropriate for review. Finally, should the court disagree and grant certiorari, Respondents herein respectfully request that certiorari include the second issue raised by Petitioners; that is, whether the Local Taxing Authorities possessed final decision making authority pursuant to § 1983.

I.

The Interlocutory Orders Of The Pennsylvania Supreme Court And Commonwealth Court Are Not Final Judgments.

The sole basis of jurisdiction asserted by Petitioners is 28 U.S.C. § 1257(a). Under that statute, the United States Supreme Court has jurisdiction to review only "final judgments or decrees rendered by the highest court of a State in which a decision could be had...." The final judgment rule has been interpreted "to preclude reviewability...where anything further remains to be determined by a State Court...." Flynt v. Ohio, 451 U.S. 619, 620 (1981) (quoting Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 124 (1945)); see also O'Dell v. Espinozo, 456 U.S. 430 (1982) (United States Supreme Court dismissal for want of jurisdiction in a § 1983 action because state

supreme court remanded case for trial). "This prerequisite to review derives added force when the jurisdiction of [the United States Supreme] Court is invoked to upset the decision of a State Court." Radio Station WOW, 326 U.S. at 124. The reason for this rule is plain: it avoids piecemeal review by the United States Supreme Court of state court decisions thereby minimizing federal court intrusion into state affairs. See Flynt, 451 U.S. at 621.

The Petition for a Writ of Certiorari filed by Petitioners is devoid of any jurisdictional basis since the orders of the Pennsylvania Supreme Court and the Pennsylvania Commonwealth Court are interlocutory.[2] By declining to grant Petitioners' petition for allowance of appeal, the Pennsylvania Supreme Court implicitly directed this matter to return to the trial court for trial. This matter is thus non-final and non-reviewable.

This case does not fall within any of the narrow exceptions of the final judgment rule mentioned by the Court in

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[2] Citing Alexander v. Mastercraft, 455 Pa. 579, 317 A.2d 278 (1974), Petitioners argue that the order dismissing the Local Taxing Authorities is considered final under state law. Petitioners are mistaken. In 1992, the Pennsylvania legislature amended Rule 341 of the Pennsylvania Rules of Appellate Procedure. Under that amended rule, an order that does not dismiss all claims and all parties is a non-final order. Moreover, the Local Taxing Authorities are not additional defendants brought into the lawsuit by Petitioners but are party defendants sued by Respondents herein. See Rules 1706.1 and 2252 of the Pennsylvania Rules of Civil Procedure. Alexander thus has been overruled by statute or, at the least, is inapposite. Petitioners reliance on Citizens & Southern Nat'l Bank v. Bougas, 434 U.S. 35 (1975) is also misplaced. There, the Court simply did not address the issue of finality under § 1257.

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 479-85 (1975). There is no identifiable federal policy that will suffer if the state proceeding goes forward. Flynt, 451 U.S. at 622. Indeed, the federal interest in adjudicating § 1983 disputes is advanced by permitting the state trial court to finally decide the case. Nor does this case fit within the exception based upon a separate and independent issue. It cannot be said that the issue in question will survive and require decision regardless of the outcome of further state proceedings; nor, can it be said that subsequent proceedings "could not remotely give rise to a federal question...that may later come here...." Cox Broadcasting Corp., 420 U.S. at 480 (quoting Radio Station WOW, Inc. 326 U.S. at 127). Further litigation of this § 1983 case likely will raise still more federal questions.

II.

This Court Previously Denied A Petition For A Writ of Certiorari On The Jurisdictional Issue Raised By Petitioners. There Is No Reason To Change That Result Particularly When The Decision Of The Pennsylvania Supreme Court Furthers State Interests In Avoiding A Multiplicity Of Suits By Way Of A Class Action.

This Court earlier denied a Petition for a Writ of Certiorari based upon the very issue Petitioners seek to have reviewed. National Private Truck Council is distinguishable from this case since it did not address the specific issue decided by the Pennsylvania Supreme Court in Murtagh I: that a state court must or should adjudicate a § 1983 damage class action alleging systematic equal protection violations. National Private Truck Council addressed claims for equitable or declaratory relief only. Moreover, as this Court noted in National Private Truck Council, even equitable relief may be invoked when "enforcement of the tax would lead to a multiplicity of suits...." National Private Truck Council, 115 S.Ct. 2357, n.6. This is precisely the concern

expressed by the Pennsylvania Supreme Court in Murtagh I, 634 A.2d at 184-85 (noting that a class action challenge in this case would "significantly reduce the inconvenience, inefficiency, delay and expense involved in countless individual lawsuits over the same issue in many different administrative and judicial forums" and would avoid "the additional expense and delay typically associated with state statutory remedies without according the taxpayers the relief sought"). This finding by the Pennsylvania Supreme Court should not be disturbed since it is in a far better position than this Court to assess whether the Pennsylvania state court system is in danger of a multiplicity of suits involving the same issues of law or fact that is best addressed by a class action.[3]

III.

The Supreme Court of Pennsylvania's Reservation And Limitation Of Issues Renders It Inappropriate For Review By This Court.

Petitioners' petition is based upon the assumption that Pennsylvania's state statutory remedies are "plain, adequate and complete." However, in Murtagh I, the Supreme Court of Pennsylvania reserved decision regarding whether the state statutory remedies are "plain, adequate, and complete." Thus, even were this Court to grant certiorari and reverse the State

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[3] Petitioners are mistaken in alleging that Murtagh I resulted in a flood of litigation. Rather, it has been used in several of Pennsylvania's counties where entrenched politicians, elected by long term residents, refuse to order countywide reassessments. The Pennsylvania Supreme Court is correct in concluding that the class action device would reduce, rather than increase, the inconvenience, inefficiency, delay and expense resulting from challenges to any Pennsylvania county's "Welcome Stranger" policy.

Supreme Court, that court could still decide the reserved issue adversely to Petitioners. The Supreme Court of Pennsylvania also specifically limited its ruling to class actions challenging systematic property assessment practices. It left open the question of whether an individual plaintiff, as opposed to a class of plaintiffs, can maintain a § 1983 action in state court without first exhausting state statutory remedies where the challenge is to an individual assessment. This reservation and limited holding renders this case inappropriate for review. Not only is the question presented for review by Petitioners based upon an assumption of state law that has not been decided by the State Supreme Court (i.e., that the state statutory remedies are "plain, adequate and complete"), the narrowness of the State Supreme Court's holding in Murtagh I simply does not present a question sufficient to justify review by the Court at this time.

IV.

If The Court Were To Grant Certiorari, The Grant Should Encompass The Issue Of Whether The Local Taxing Authorities Can Be Held Liable For Having Final Decision Making Authority Pursuant To 42 U.S.C. §1983

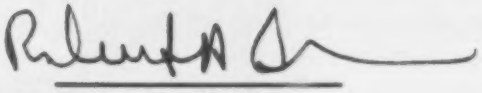
Were the Court to grant certiorari, the grant should encompass the issue of whether the Local Taxing Authorities can be held liable for having final decision making authority pursuant to 42 U.S.C. § 1983. See Jett v. Dallas Independent School District, 491 U.S. 701 (1989); City of St. Louis v. Praprotnik, 485 U.S. 112 (1988); Pembaur v. City of Cincinnati, 475 U.S. 469 (1986).

CONCLUSION

For all the foregoing reasons, Respondents respectfully urge this Court to deny the Petition for Writ of Certiorari. However, were the Court to grant the Petition, the grant should include review of the issue whether the Local Taxing Authorities possessed final decision making authority pursuant to 42 U.S.C. § 1983.

February 23, 1996

Respectfully submitted,



Robert A. Swift
(Counsel of Record)
Denis F. Sheils
KOHN, SWIFT & GRAF, P.C.
2400 One Reading Center
1101 Market Street
Philadelphia, PA 19107
(215) 238-1700

Richard D. Adamson
RICHARD D. ADAMSON,
ATTORNEY AT LAW
253 West Main Street
Kutztown, PA 19530
(215) 683-6500

Counsel for Respondents